United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-4130

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
As

DIGNA BALLENILLA-GONZALEZ,

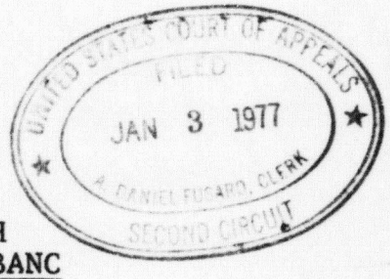
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Civil Action No. 76-4130



PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

Petitioner DIGNA BALLENILLA-GONZALEZ, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, hereby petitions for a rehearing of the decision of this Court in the above case rendered December 10, 1976, per Mansfield, Circuit Judge. In the alternative, Petitioner respectfully suggests that this case be reheard by the Court of Appeals en banc in order to determine:

(1) Whether deportation of an alien parent is a de facto deportation of a citizen minor in violation of the citizenship clause of the fourteenth amendment to the United States Constitution;

(2) Whether Congress' recent enactment of the Federal National Legal Services Corporation Act. 42 U.S.C. §§ 2996 - 2996 (1) supersedes §§ 242 (b) (2) and 292 of

the Immigration and Nationality Act, 8 U.S.C. §§ 1252 (b) (2) and 1362 which provide that an alien shall have the privilege of being represented by counsel at no expense to the Government, and:

(a) Whether the Government has the duty to inform an indigent alien of the availability of free legal services created under 42 U.S.C. § 2996 - 2996 (1),[1/]

(b) Whether the Government is estopped from misleading and misinforming indigent aliens as to the availability of free government funded legal services by stating that an alien has the right to retain counsel but at no expense to the Government;

(3) What standards should be used to determine the validity of an alien's waiver of the statutory right to retain counsel pursuant to 8 U.S.C. §§ 1252 (b) (2) and 1362, including:

(a) Whether the waiver must be knowing intelligent and voluntary;

(b) Whether a waiver prior to understanding the nature of the proceedings is valid; and

(c) Whether a waiver can be inferred from an alien's equivocal statements about whether she thinks she has a need for counsel.

Petitioner submits the following points in support of her

1/ In regard to this question, Petitioner suggests that the Court invite the Office of General Counsel, Legal Services Corporation, Washington, D.C. 20005 to file a brief amicus curiae expressing the views of the Legal Services Corporation.

Petition:

(1) This Court's decision of December 10, 1976 rejected Petitioner's claims that her procedural rights had been violated. The Court's opinion was based on its contention that Petitioner had not been prejudiced by I.N.S. actions since she was clearly deportable at the time of the hearing. Consequently, it is crucial that this Court decide whether the finding of deportability is itself unconstitutional in that it amounts to a de facto deportation of an infant United States citizen in violation of the citizenship clause of the fourteenth amendment. Section 1., fourteenth amendment, U.S. Constitution. This decision was recently reached in Acosta v. Gaffney, 413 F. Supp. 827 (D. N.J 1976), appeal docketed No. 76-209 (3rd Cir. July 13, 1976). The court in Acosta held that deportation of alien parents which results in a de facto deportation of their citizen infant violates the citizenship clause of the fourteenth. This question is a matter of first impression in this Circuit and deserves a rehearing in view of the Court's finding of deportability. Cf. Faustino v. I.N.S. 432 F2d 429 (2nd Cir. 1970) (holding that a proviso allowing citizen children to secure admission of their parents free from numerical limitation only when the child is 21 years of age or older did not violate equal protection under the Fifth Amendment), and Encisco-Cardoza v. I.N.S. 504 F2d 1252 (2nd Cir. 1974)(affirming the Board of Immigration Appeals decision denying a citizen child's motion to intervene in a deportation

proceeding on the grounds that it did not deny the child due process of law under the Fifth Amendment).

Petitioner's child was born in Waterbury, Connecticut on September 15, 1974 (Slip Opinion at 889). The child like any child born within the United States (whether to citizen parents or as here, an alien parent illegally within the country) is a citizen of the United States. United States ex rel. Hintopoulos v. Shaughnessy 353 U.S. 72, 73 (1957); Perkins v. Elg 307 U.S. 325 (1939); United States v. Wong Kim Ark 169 U.S. 649 (1898). Neither Congress nor the Executive has the authority to deport a citizen. As Mr. Justice Gray wrote for the Supreme Court in Wong Kim Ark and quoted in Acosta v. Gaffney, supra at 831:

> . . . citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.
>
> . . . Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of congress, as to providing for the naturalization of parents or children of a particular race can effect citizenship as acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

Consequently, deportation may only be imposed on aliens, 8 U.S.C. 1251.

Deportation of the alien parent of a minor child results in the de facto deportation of that citizen child. Aalund v.

Marshall 461 F2d 710, 714 (5th Cir. 1972); Gonzalez-Cuevas v. I.N.S. 515 F2d 1222, 1224 (5th Cir. 1975). Thus, the deportation of Petitioner Gonzalez would result in the de facto deportation of her infant citizen child in violation of the Constitution.

(2) This Court's decision was also based on its finding that Petitioner had waived her right to retain counsel. The Court expressly limited its holding to the validity of an alien's waiver of her right to retain counsel under a misapprehension of the law. (Slip Opinion at 896) However, Petitioner also maintained that at the time that she was asked to waive her right to counsel she was not informed by the immigration judge that as an indigent alien she could retain free legal services at Government expense, did not fully understand the nature of the proceedings and in fact, never unequivocally waived her right to retain counsel. Therefore, it is important that this Court resolve the following unanswered questions relating to the validity of the alleged waiver:

(a) Does misapprehension of the availability of free legal services at Government expense and therefore misapprehension of one's ability to retain counsel make an otherwise valid waiver improper? Petitioner, an indigent alien was not told that free legal services was available to her under 42 U.S.C. § 2996 - 2996 (1) until the end of her deportation hearing. Not only was she not informed of the availability of free government funded legal services, but she was mislead

to believe that these services were not available when the immigration judge told her she had a right to retain counsel as long as it was not at Government expense. (Slip Opinion at 890, n.2) Therefore:

- Does the Government have an affirmative duty to inform an indigent alien of the availability of free legal services? Barthold v. I.N.S. 517 F2d 689 (5th Cir. 1975).
- Should the Government be estopped from advising aliens at the deportation hearing that they have a right to retain counsel, but not at Government expense in light of Congress' recent enactment of the Federal National Legal Services Corporation Act 42 U.S.C. 2996 - 2996 (1) which provides Government funded free legal services to indigents? In 1952, when Congress passed the Immigration and Nationality Act providing for a statutory right to retain counsel at no expense to the Government in a deportation hearing, it did not forsee the development of Government funded legal services programs and therefore could not have intended to preclude its availability to indigent aliens in such proceedings. U.S. Code Cong. and Adm. News 82nd Cong., 2d Sess. 1712 (1952).

(b) Is a waiver made prior to an understanding of the nature of the deportation proceedings valid? This Court's opinion acknowledges that the immigration

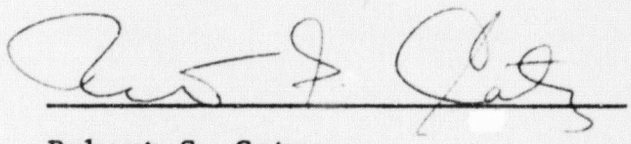
judge had to go off the record to explain the Order to Show Cause to Petitioner. (Slip Opinion at 890) This occurred after she purportedly waived her right to counsel. Thus any waiver was made prior to a full understanding of the nature of the proceedings. Cf. Burquez v. I.N.S. 513 F 2d 751 (10th Cir 1975).

(c) Can a waiver be inferred from an equivocal statement made by an alien about her opinion of whether or not she needs counsel? The Government inferred such a waiver from Petitioner's statement -- "I don't think there will be any problem. I don't think I need a lawyer". This statement follows a confusing dialogue with the immigration judge in which Petitioner attempts to seek advice about her need for counsel. (Slip Opinion at 890, n. 2).

CONCLUSION

For the foregoing reasons, Petitioner prays that rehearing be granted in order for the Court to consider the significant issues raised in this Petition.

Respectfully submitted,



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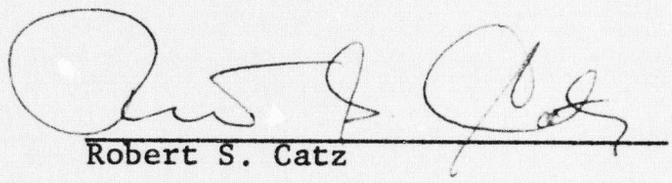
December 29, 1976

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing was served via U.S. Mails on Counsel for Respondent this 29th day of December, 1976 to: Robert Grogan, Esq., Ass't U.S. Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y. 10007



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